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No. 91-1662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JADER FUEL COMPANY, INC.,

Petitioner,

v.

BILLIE WILLIAMS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner's Statement of the Case is incomplete and, in some instances, inaccurate. Therefore, Respondent submits a Supplemental Statement of the Case in this Brief.

Lovilia Coal Company ("Lovilia") was a partnership consisting of Tommy Wignall ("Wignall") and Billie Williams ("Williams"). (T.51-52). The lawsuit was filed by and prosecuted by one of the partners, viz., Billie Williams, on behalf of the Partnership, Lovilia Coal Company.

On December 1, 1981, Lovilia and Jader Fuel Company, Inc. ("Jader") entered into a Contract Mining Agreement ("Agreement"), prepared by Jader's lawyer, obligating Lovilia to mine and produce, by underground means, all of the coal in the number five seam and the number two seam underlying the Green tract and other tracts to be acquired by Jader. (T.108-109, Pet.A.p.51-64). The Agreement provided that only Jader was authorized to market the coal. (Pet.A.p.51-64).

Lovilia and Jader began negotiating the Agreement sometime in mid-November, 1981. (T.54) During the negotiations, Jader and Lovilia discussed the mining of the Green tract. (T.54-55) Wignall testified that, during the course of the negotiations, the parties discussed mining on other tracts contiguous with the Green tract. (T.55).

Subsequent to execution of the Agreement, Lovilia drove three entries underground to open the mine. The first coal was removed on April 1, 1982. (T.56) The three entries consisted of the air course, the belt course and the travelway. (T.58) The air course provided ventilation by exhausting air from the mine. (T.58) The belt course contained a belt feeder to carry coal from the working face of the mine to a point above ground. (T.58) The travelway provided a means of ingress and egress for personnel and supplies and a pathway for fresh air to enter the mine. (T.59) Air was circulated in the mine through the ventilation system in order to sustain the lives of mining personnel and to exhaust methane gas from the mine. (T.59)

Four separate tracts of land, three of which are contiguous with a central tract, relate to this lawsuit and are described as follows:

(a) the Green tract consisting of 200 acres (the central tract around which the other tracts build additional acreage), in Section 15,

(b) the Shawnee tract, which was subsequently acquired by Jader, consisting of 80 acres, (located west of the Green Tract) in Section 16,

(c) the Consolidation tract, which was subsequently acquired by Jader, consisting of 200 acres, (located North of the Green Tract) in Sections 10 and 15, and

(d) the Roe tract, which was subsequently acquired by Jader, consisting of 60 acres, (located East of the Green Tract,) in Section 15. (T.2-13)

The underground mining operations proceeded North within the Green tract. (T.61-62) Lovilia then mined to the West and entered the Shawnee Tract and temporarily ceased mining in that area in September, 1983. (T.61-62) Lovilia then mined East to the East limits of the Roe Tract. (T.62) Lovilia reached the Eastern limit of the underground mine in June, 1984. (T.62) Lovilia then mined to the South completing the works to the South in the Roe Tract in September, 1984. (T.62-63) Then, Lovilia mined North into the Consolidation Tract until March, 1985. (T.63)

Wignall was actively involved in Lovilia's mining activities. (T.63-64) He testified that in the summer of 1982, there was a conversation between Mr. Carr and Ed Downen, as representatives of Jader, and Wignall and Williams, of Lovilia, in which they discussed Jader's acquisition of the Shawnee tract. (T.64-65) Mr. Carr testified that he did not attend such a meeting. (T.255) Ed Downen testified that he did not recall attending any meeting. (T.295) Wignall testified that during the conversation, the representatives of Jader told Wignall and Williams that Lovilia could commence mining to the West on the Shawnee tract. (T.65) At that time, Lovilia turned its mine West towards the Shawnee tract and mined part of the underground coal lying under the Shawnee Tract. (T.65)

Wignall testified that, in mid 1984, he had various conversations with Jader personnel concerning mining on the Consolidation tract. (T.65-66) These conversations took place in Jader's office and at the underground mine site. (T.66) Mr. Carr testified that he never attended such a meeting. (T.261) Ed Downen testified that he did not have a meeting with Williams, Wignall and Mr. Carr. (T.296) Wignall testified that he had later conversations with Jader personnel at Jader's office in Shawneetown, Illinois, after Jader acquired a lease for the Consolidation tract. At that time he was informed that Jader had acquired a portion of the Consolidation tract and that Lovilia could mine the tract. (T.67)

A mine map showing the location of the mined areas was prepared each month. (T.112) Four copies of the map were produced. (T.113) One was for Lovilia's office and one was for the bath house. (T.113) One was made especially for Jader. (T.113) The maps were not delivered to Jader but remained at Lovilia's office to be picked up by Jader personnel. (T.113) Williams testified that Mr. Carr of Jader was at the mine every two or three days. (T.113) Jader was furnished with a map every month showing the location of Lovilia's underground mining operation. (T.112)

Williams testified that he was never told that Lovilia should not go on the Shawnee tract. (T.113) Also, Mr. Carr of Jader picked up a map showing the location of the underground mining operation when it crossed into the Shawnee tract. (T.114)

Lovilia temporarily ceased mining of coal on April 1, 1985. (T.69) Following the temporary closing, Lovilia kept the mine manager and a couple of mechanics at the mine to maintain ventilation, to keep the pumps running, inspect the mine daily and to keep the mine in shape to produce coal as soon as the coal market picked up. (T.69)

Under the terms of the Agreement between Lovilia and Jader, Lovilia conducted its mining operations within the scope of a permit obtained by Jader. (Pet.A.52) In a letter from Mr. Carr, one of Jader's employees, to the Illinois Department of Mines and Minerals dated June 5, 1985, Mr. Carr, referring to the Lovilia mine, stated that:

> "This letter is to inform the Illinois Department of Mines and Minerals of the temporary cessation of Jader Mine No. 4, Permit No. 9 . . . The mining activities during the temporary cessation will consist of routine maintenance and water pumping . . . the closing of the underground mine is temporary and will open as soon as market conditions improve." (T.34, Plaintiff's Exhibit No. 21).

During this time, the ventilation in the mine was continued and the pumps run to keep the ground water under control. (T.69-70) The machinery in the underground mine was maintained and started from time to time to make sure that it was in shape to continue mining the coal. (T.70)

Lovilia had stockpiled approximately a quarter of a million dollars worth of coal that had been mined but not sold by Jader and was arranging new financing. (T.105)

On July 18, 1985, Williams contacted John Tucker and asked him to check the underground coal mine, check the equipment, check the general condition of the mine and see how long it would take before the mine could be producing coal. (T.122) On July 19th, Tucker and his son went underground to the producing section of the mine. (T.122) They checked the equipment, turned the equipment on and ran the equipment. (T.122) At that time, the water level in the mine was normal. (T.123) Tucker observed that the pumps were operating at this time. (T.123) Tucker called Williams and told him that the mine could be in operation in three to four shifts. (T.123)

In May, 1985, Ed Downen of Jader told Mr. Carr to stake off the western limits of Lovilia's underground mining activities on the Shawnee Tract. (T.25) Stakes consisting of five foot wooden lathes two inches wide were placed at the Westerly end of the underground works. (T.28) Mr. Carr placed blue and pink ribbons on the stakes and identified the stakes by writing the words "underground mining limits" on them. (T.28) Mr. Carr placed the pink and blue ribbons on the stakes to set them apart from other stakes. (T.29)

In June, 1985, Jader began to strip mine the No. 5 seam in the Shawnee tract at a point west of the Lovilia underground works in that tract. (T.22) In May, 1985, Mr. Carr had a conversation with Ed Downen concerning the placement of the box cut, or first cut, in the strip mining operation. (T.23-25) Ed Downen was the general superintendent of mining for Jader. (T.40) The box cut was approximately 70 feet wide and approximately 40 feet deep. (T.23)

Ed Downen saw the stakes prepared by Mr. Carr. (T. 40-41) The initial box cut for the strip mine was West of the stakes that marked the perimeter of the underground mine works. (T.42) After the initial box cut, Ed Downen directed Jader personnel to make a cut to the West of the box cut. (T.42) Then, he directed Jader personnel to begin cuts to the East. (T.42) Ed Downen was on the site and observed the cuts being made. (T.42-43) While he was on site, Ed Downen directed Jader personnel to cut through the underground mine works of Lovilia. (T.43) After seeing the underground works exposed to the surface, he ordered at least two additional cuts to the East. (T.43-45) At that time, Ed Downen knew about Lovilia's continuing underground activities and knew that Lovilia had mining equipment in the underground mine. (T.43-45)

Jader placed fire clay in the opening of the Lovilia mine created by the cuts. In the Petitioner's "Statement of the Case", it states as follows:

> "The state permit allowing Jader to mine the Shawnee tract contained several provisions dealing with the management of mine openings of old works of underground mines (Tr.265-66). The final permit provided that mine openings were to be sealed by compacting underground material around the openings (Tr. 267). During the permit process, the State mining inspector reviewed the problem of surface mining over the abandoned area of the active Lovilia mine. He stated in a letter, which became an attachment to the permit, that the mining was being done over the abandoned areas of the Lovilia mine and he saw no problems with the safety involved in that operation (Tr. 271).
>
> "On or about August 6, 1985, over four months after Lovilia had laid off all of its employees and ceased mining operations, Jader cut into a portion of the Lovilia underground mine while conducting strip mining activities (Tr. 320-22). Jader subsequently sealed the openings with ten feet of fire clay, which was compacted by a bulldozer as required by the state permit (Tr. 320-22)."

Petitioner implies to the reader that Lovilia's underground works were "old works", that the permit allowed Jader to cut into the underground works, and that the permit requirements for sealing "old works" were applicable to the Lovilia mine and were satisfied by packing fire clay in the openings created by Jader's cuts. The implication is false. Jader's mine was an "active mine" being ventilated and maintained and was not "old works". Moreover, Lovilia's experts testified that simply shoving fire clay and materials such as that into the hole would definitely not stop the water from entering Lovilia's underground mine. (T.218) In order to prevent water from com-

ing into the underground mine, Jader should have built a concrete block wall notched into the floor, ribs, and roof of the mine. (T.218) Lovilia's experts testified that Jader's strip mining operation which opened Lovilia's underground mine was "a very bad practice, reckless practice, unsafe practice." (T.215) Also, it is noteworthy that the fire clay was not placed in the opening until many days after the opening of the underground mine. (T.133-134, Pet.A.p.5)

Wignall was advised of the cut into the west entry of the underground mine in early August, 1985, when he received a telephone call from John Tucker. (T.70) He went to the mine the next day to perform a visual inspection. (T.70) Wignall observed that the volume of water coming into the mine from the West had increased. (T.70) He observed that roof bolts and header boards were in the spoil material removed by Jader. (T.71) In early August, Wignall met with Mr. Carr, Jader's engineer. (T.71-72) During that meeting, Mr. Carr stated that he laid out the Lovilia works for Jader, but that "they [Jader] just didn't pay any attention to it." (T.72)

A few days later, Wignall spoke with Jader's working foreman, Bill DeVous. (T.72) Wignall gave the following substance of his conversation with Mr. DeVous:

> I asked him how come he mined over the layout that Mr. Carr had laid out where our underground works was at, and I said you mined into us, you knowingly mined into us, you knew where you were at, and he said yes, I was told to do so by Ed Downen, . . . as a matter of fact, I knew we were over your old works because we lost water on our drill on one of the holes and had to set over to drill one of our shot holes. (T.72-73)

Lovilia's mine manager, Mr. Tucker inspected the mine on 21 different days from August 6, 1985 through Septem-

ber 9, 1985. (T.123-156) Mr. Tucker testified that the floor of the mine sloped downward from the South towards the North at a grade of 4 to 8 percent. (T.126) On August 6th he could not reach the working face of the mine because of water accumulation, the cutting machine was under water and the trailing cables that went from the power station to the equipment were lying under 3 to 6 inches of water. (T.126-128) Water was running rapidly from the braddish line towards the North working area of the mine. (T.129) Mr. Tucker further observed a 6 to 8 inch trench in the floor of the mine made by the force of running water. (T.130)

After his inspection of the mine, Mr. Tucker spoke with Mr. DeVous of Jader. (T.132) At that time, Mr. Tucker testified that he accompanied James Rash, Charles McAllister, Danny Wignall and Mr. Bill DeVous to the stripping pit where Jader's strip mining operation was digging its coal. (T.132-133) At the strip site, Tucker observed the exposed works of the underground mine and surface water running into the strip pit. (T.133) Water was flowing from the strip pit towards the underground entries. (T.134) After observing the site, John Tucker telephoned Wignall and advised him that Jader was stripping across the works of the underground mine. (T.135)

During John Tucker's subsequent checks on the mine, he observed that the ventilation to the mine had been disrupted and the amount of air entering the mine was reduced from 42,000 or 43,000 cubic feet to 9,300 cubic feet. (T.136)

The volume of water in the mine increased throughout the month of August, 1985. (T.123-153) The mine contained three pumps which were used to pump the water. (T.188) On September 6, 1985, there was a 4½ inch rain in the

vicinity of the mine. (T.155) There was also a power failure at the mine on that day. (T.154-155) When John Tucker returned to the mine on September 7th, the water had covered all of the mining equipment, power transformer and belt drives. (T.155-156) On September 9th, a federal inspector by the name of Mr. Holland posted an order at the mouth of the portal of the underground coal mine preventing entry to the coal mine. (T.156)

John Tucker testified Lovilia was unable to remove certain equipment from the mine after August 5th, because the power cable had become waterlogged and any person who attempted to operate the equipment could have been electrocuted. (T.158)

Williams' experts, John P. Weir and Edwin Phelps, testified that Jader's opening of Lovilia's underground mine was a very bad practice, a reckless practice and an unsafe practice. (T.215-218; 234-237) Williams' experts testified that the cutting into an underground opening is unsafe to the strip miner and to the underground mine, because there could be methane gas in the openings which could cause an explosion that could injure or destroy life and equipment both on the surface and in the underground mine. (T.215-216; 234-235) They also testified that when the strip mine cut into the underground mine, the ventilation system was short circuited and the underground mine no longer properly ventilated. (T.216; 236-237) They also concluded that by placing an opening into the West side of the mine, the underground mine was open, water was allowed entry into the mine and flowed to the North part of the mine, preventing further mining. (T. 216-217; 235-236)

At the time Lovilia's mine was flooded, it contained 510,000 tons of recoverable coal. (T.219-221) Of the recov-

erable coal, 465,000 tons were located on the Consolidation tract, 35,000 tons were located on the Green tract and 10,000 tons were located on the Shawnee tract. (T.219-221)

Mr. Snyder performed an inspection and appraisal of the equipment and inventory located in the Lovilia mineworks on May 15, 1985. (T.479-480) The total value of equipment in Lovilia's mine at that time was $433,000. (T.488)

Lovilia's accountant, Mr. William Schott testified that he prepared financial statements for Lovilia in 1982, 1983 and 1984. (T.489-491) Based upon his review of revenues, tons of coal sold and expenses, Mr. Schott testified that the projected profits per ton of coal for the remaining coal in Lovilia's mine was $4.49 per ton based upon a production figure of 170,000 tons per year. (T.491-492)

ARGUMENT

I.

THE TRIAL JUDGE ERRED IN GRANTING A MOTION FOR DIRECTED VERDICT ON WILLFUL AND WANTON (PUNITIVE DAMAGES) COUNT.

A. The Standard Of Review Established By The Court Of Appeals Is The Correct Standard Of Review In The State Of Illinois.

The Trial Judge in this case allowed a Motion of the Defendant for a directed verdict on a willful and wanton (punitive damages) count. The Court of Appeals reversed that ruling. The Petitioner asserts that the standard of review utilized by the Court of Appeals was contrary to Illinois law. In reversing the Trial Court, the Court of Appeals stated the standard of review is as follows: Decisions to direct verdicts in Illinois are generally reviewed de novo by courts of review. Therefore, Illinois courts of review apply the same standard as the Trial Court, viz.,

they view the record in the light most favorable to the Plaintiff. This standard is consistent with state court decisions. See *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397 (1990); *Pedrick v. Peoria and Eastern Railway Co.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967); and *Queen v. Behm*, 58 Ill.App.3d 253, 373 N.E.2d 1382 (2d Dist., 1978). In *Loitz*, the jury had returned a verdict granting punitive damages. The State Supreme Court reviewed the results in the Trial Court and, at page 426, stated:

> "Viewing the record in the light most favorable to the plaintiff (see *Pedrick v. Peoria & Eastern R.R. Co.*, (1967), 37 Ill.2d 494, 510), we do not consider that the evidence described above, or the additional expert testimony presented by the parties, was sufficient to warrant imposition of punitive damages in this case. . ."

At page 427, the Court went on to state:

> "We conclude that there was not sufficient proof that Remington had the requisite degree of culpability that would warrant imposition of a sanction that is intended to punish and deter. As we have indicated, evidence of willful and wanton misconduct requires more than proof of mere negligence, and we do not consider that the plaintiff satisfied that burden here."

In applying the standard from *Pedrick v. Peoria and Eastern Railway Company*, 37 Ill.2d 494, 229 N.E.2d 504 (1967), and in reversing the Trial Court, the State Supreme Court obviously applied a de novo review. Therefore, the standard of review applied by the Court of Appeals in this case is the correct standard of review under the law of Illinois.

Next, Petitioner asserts that the opinion of the Court of Appeals in this case is in conflict with an earlier opinion of that Court in *Ampat/Midwest, Inc. v. Illinois Tool*

Works, Inc., 896 F.2d 1035 (7th Cir., 1990). Our responses to that assertion are as follows:

1. A review of the opinion in *Ampat* does not demonstrate any inconsistency. By way of illustration, at page 1044, the *Ampat* Court applied the *Pedrick* rule in Illinois by stating:

> "*Viewed as they must be in the light most favorable to AMPAT*, the facts disclose highly irresponsible behavior by Illinois Tool Works, to be sure . . . but, everything considered, we cannot say that the judge misapplied the Illinois standard for granting punitive damages." (emphasis added)

2. The Court of Appeals is perfectly capable of determining if there are any inconsistencies between its opinion in this case and its opinion in *Ampat*. Petitioner, citing *Loitz*, raised the same issue in a Petition for Rehearing En Banc filed with the Court of Appeals in this case. The Court of Appeals unanimously denied that Petition. (Pet. A.p.34) Therefore, it obviously believed there was no inconsistency.

B. The Trial Judge Erred In Granting A Motion For Directed Verdict.

The conduct of Jader, including the directives of its General Superintendent of Mining, Ed Downen, as established in the Statement of the Case portion of this Brief clearly demonstrates a prima facie showing of willful and wanton misconduct. Mr. Downen directed surface mining cuts into the underground works of Lovilia. The Court of Appeals reviewed that factual background and concluded that there was a prima facie showing of willful and wanton misconduct and the trial judge erred by taking that issue from the jury by a directed verdict. (Pet.A.p.12-16).

Petitioner contends that there is a nebulous "abuse of discretion" standard of review in the state of Illinois. As previously stated in Subpart A of the Argument, that is not the standard of review in the State of Illinois. Moreover, even if it could be said that such a standard were valid, the trial judge erred in granting a Motion for Directed Verdict in light of the evidence that had been presented.

II.

THE TRIAL JUDGE ERRED IN GRANTING A MOTION FOR DIRECTED VERDICT ON CONTRACT COUNT.

As the Court of Appeals stated, under Illinois law, every contract implies good faith and fair dealing between the parties. (Pet.A.p.8) Petitioner contends that Jader retained the absolute right to mine the area in question and that the retention of such right defeats and negates any right of Lovilia with the result that there is no breach of that implied covenant. That argument was fully reviewed and analyzed by the Court of Appeals and found wanting. The Court stated that, resolving factual disputes in Lovilia's favor, (1) Jader had permission to mine the Shawnee tract; (2) By cutting through Lovilia's mine, Jader exercised its discretion in such a way as to prevent Lovilia from continuing its mining operation; (3) This conduct of Jader prevented Lovilia from performing its obligations under the Agreement; and (4) the question of whether or not Jader acted in bad faith is a question for the jury. (Pet.A.p.9-11). Therefore, the opinion of the Court of Appeals clearly demonstrates the fallacy of Jader's position on that issue.

CONCLUSION

There is no showing by Petitioner of any valid grounds for review by this Court. Therefore, the Petition for the Writ of Certiorari should be denied.

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